



U.S. Citizenship
and Immigration
Services



FILE:



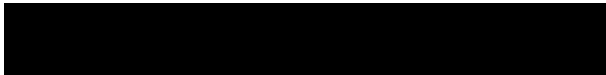
Office: TEXAS SERVICE CENTER

Date:

OCT 28 2004

IN RE:

Applicant:



APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:

Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The application was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director determined that the applicant was ineligible for TPS because he had been convicted of a felony. The director, therefore, denied the application.

On appeal, the applicant states that he did not have enough time to retain an attorney to represent him. While the applicant indicates that he is sending a brief and/or evidence within 30 days, to date, no brief or additional evidence has been received. Therefore, the record is considered complete.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for TPS during the initial registration period announced by public notice in the *Federal Register*, or
 - (2) During any subsequent extension of such designation if at the time of the initial registration period:
 - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
 - (iii) The applicant is a parolee or has a pending request for parole; or

- (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

Pursuant to section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), an alien shall not be eligible for temporary protected status if the Attorney General, now, the Secretary of the Department of Homeland Security (the Secretary), finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States.

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

Felony means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the State as a misdemeanor, and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

Misdemeanor means a crime committed in the United States, either:

- (1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or
- (2) A crime treated as a misdemeanor under the term "felony" of this section.

For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a felony or misdemeanor.

The record reflects that on April 17, 1996, in Bellaire, Texas, the applicant was arrested and charged with tampering with government record-defraud/harm, a felony. On April 19, 1996, in the District Court of Harris County, Texas, Cause No. [REDACTED] the applicant entered a plea of guilty to the charge. He was sentenced to 60 days in the county jail and assessed \$141.50 in court costs; in lieu of confinement and court costs, he was ordered to serve 100 hours of community service.

The record in this case shows that the offense of tampering with government record-defraud/harm, is a felony offense. However, the court disposition states that, "in accordance with Section 12.44(a), Penal Code of Texas, the Court finds that the ends of justice would best be served by punishment as a Class A Misdemeanor. Defendant is adjudged to be guilty of a State Jail felony and assessed the punishment as indicated above." PC 12.44(a) states, in part:

A court may punish a defendant who is convicted of a state jail felony by imposing the confinement permissible as punishment for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice.

The court disposition further states, "On the 19 day of April, A.D. 1996, it is therefore CONSIDERED, ORDERED, AND ADJUDGED by the Court that the defendant is guilty of the offense as indicated above, a felony, and that the said defendant committed the said offense on the date indicated above, and that he be punished as indicated above, and that the State of Texas do have and recover of the Defendant all costs of the prosecution, for which execution will issue."

The applicant furnished a Certificate of Disposition dated March 20, 2003. This certificate is an excerpt of the court's conviction record. The certificate indicates that the information contained is a true and correct restatement of the "summary electronic data" of the records filed and/or recorded in the District Clerk's Office. The certificate further indicates that, "The court authorized the state to prosecute the case as a misdemeanor under Texas Penal Code Section 12.44(b)." Additionally, the certificate indicates that "deferred adjudication of guilt terminated, defendant discharged, case dismissed."

The Certificate of Disposition, however, is inconsistent with the actual court documents contained in the record of proceeding and as previously addressed. Further, while the certificate shows that the case was prosecuted as a misdemeanor under PC 12.44(b), the actual court record shows that the applicant was adjudged guilty of the felony offense, and that only his punishment was for a Class A misdemeanor pursuant to PC 12.44(a). Moreover, even if the applicant's conviction was subsequently dismissed, the Board of Immigration Appeals, in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), held that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. The applicant, therefore, remains convicted of the felony offense for immigration purposes.

Accordingly, the applicant is ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his felony conviction. There is no waiver available to an alien convicted of a felony committed in the United States.

The burden of proof is upon the applicant to establish that he meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.